United States Court of Appeals

for the Second Circuit

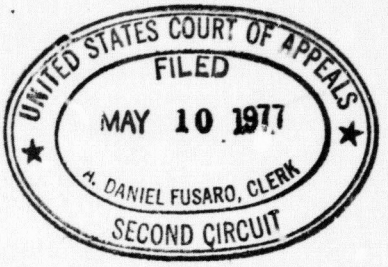
PETITION FOR REHEARING

76-7400

In The

United States Court of Appeals

For The Second Circuit



Marian Gatefield,

Plaintiff-Appellee,

vs.

Advanced Computer Techniques Corporation,

Defendant-Appellant.

On Appeal from a Judgment of the United States District Court for the Southern District of New York

B P/S

Petition for Rehearing

Lewis & DeClemente
Attorneys for Defendant-Appellant
757 Third Avenue
New York, New York 10017
(212) 421-8837

Preliminary

This is a petition for rehearing by defendant-appellant Advanced Computer Techniques Corp. from a judgment entered by this Court on appellant's appeal, dated April 26, 1977.

Points of Law and Fact That Court Overlooked or Misapprehended

1. The Trial Court charged that the "key question" in this case was

> "...whether this plaintiff left on her own accord against the will of her employer; or whether she left with her employer's consent." (228a/19-22)

The Court of Appeals overlooked the plain and unequivocal admissions of plaintiff that she did not have that consent, and knew she did not have that consent, and that she was leaving against the will of the employer. The Court of Appeals also overlooked the absence of any testimony by plaintiff that she had that consent.

2. The Court of Appeals misapprehended the Rules governing modifications to employer-employee contractual arrangements. If the employer, Advanced Computer Techniques Corp. ("ACT"), did initially grant plaintiff, Ms. Gatefield, oral permission to take a leave of absence at the end of May, 1965, it was a gratuitous undertaking because Ms. Gatefield's employment contract made no provision for leaves of absence. Any oral modification was unenforceable. In any event, that permission could be revoked by ACT, particularly for reasons that directly related to the need for Ms. Gatefield's technical skills on a vital project during the first part of the time period scheduled for that leave.

Legal Argument

I.

Evidence Overwhelmingly Demonstrates That Gatefield Had No Permission to Leave, and That There Was Just Cause for Her Termination

The jury made a completely unreasonable finding that overlooked not just an inference, but a series of admissions by plaintiff that she had not met the test laid down by the Trial Court.

The charge given to the jury by Judge MacMahon stipulated that the "key question" was:

> "...whether this plaintiff left on her own accord against the will of her employer; or whether she left with her employer's consent." (228a/19-22)

That charge has not been modified or challenged in any way by the plaintiff or by this Court. However, the plaintiff's own testimony and the unrebutted testimony of the defendant's witnesses established without any question whatsoever that (1) Ms. Gatefield did not have the employer's consent

to leave and (2) she knew she did not have that consent.

It appeared that the Court of Appeals, during oral argument, took the position that the jury could have rationalized that having been given consent initially to take a leave of absence, the employer, ACT, had no right to withdraw that consent and/or did not do so.

We respectfully submit that if that theory were relied upon in reaching a decision, as it appears, it would be unsupportable as a matter of law, and is totally inconsistent with the facts. Indeed, the plaintiff, herself, never raised this argument to support her position at trial, or on appeal, and for good reason.

A. Plaintiff admitted that she did not have consent of the Company to leave

At no point during her testimony did Ms. Gatefield ever state that she knew she had, or even thought she had, the consent of either Mr. Schachter, the Executive Vice President, or Mr. Lecht, the President, or any other authorized ACT representative, to take a leave of absence at the time she did. She took her leave while engaged as a manager of what she

herself described as "the design phase" of the COINS project for First National City Bank (282a) On the contrary, she admitted at three different times that Mr. Lecht, the President, had asked her to stay (66a/7-14; 68a/16-20; 126a/22-127a/15).

In itemized form below are the admissions of Ms. Gatefield and the totally unrebutted testimony of defendant's witnesses that demonstrate, beyond a shadow of a doubt, that Ms. Gatefield had no permission to leave when she did, and knew that she did not have that permission:

Admissions

Testimony that acknowledged she had no permission	Reference
"[H]e [Lecht] asked me not to leave on May 30."	127a/4
"He [Lecht] asked me to stay for another week."	127a/9
"[H]e asked me if I would consider staying another week as he was not completely happy about my replacement. He did not yet know whether he would prove to be technically competent."	68a/17-20

"I believe [First National City Bank] had five days in which to decide whether they wanted a person working on the project or not." 115a/25

"Q. Mr. Rosen hadn't been approved by the First National City Bank, had he? 115a/20-22

A. No."

"...ACT personnel had been considered... Q. But no one had been found? 111a/3-6

A. Correct."

Testimony that she had permission to leave

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Unrebutted Testimony

Testimony that Ms. Gatefield had no permission to leave	Reference
Mr. Schachter (Exec. Vice President) said to Ms. Gatefield "I could not understand why she was planning to leave at that point right in the middle of this project which she had committed to." (May 12-14)	152a/20-25

"I told her she could not leave." (Schachter, May 21) 156a/10

"I absolutely, without qualification, do not give you authorization to take a leave of absence from this company." (Lecht, mid-May) 194a/15

In contrast to these admissions, and unrebutted testimony on critical statements made to Ms. Gatefield, Ms. Gatefield has supplied no defense other than to state that when Mr. Lecht spoke to her around the time that she was threatening to leave, he had not directed her not to leave but "asked me not to leave" (126a/22-127a/15) (emphasis ours).

Her contention that this was not a direction, but a request, is simply incredible, and not consistent with any rational thinking concerning her duties and obligations and an employer's rights and privileges. Indeed, there is a case squarely in point, previously cited by the defendant, Kirchof v. Friedman, 457 P.2d 760 (Ariz., 1969), which flatly holds that even suggestions made by a restaurant owner to his manager (who had been explicitly given "day to day" management of the operations) about menus could not be countermanded by the employee and would amount to "insubordination". Insubordination did not have to be

proven in this case as Judge MacMahon noted, only a lack of consent. So there is a far stronger case in favor of the employer here than in Kirchof.

B. Ms. Gatefield's behavior is conclusive evidence of her knowledge that she was denying the employer's directions when she left for England

Ms. Gatefield testified that she had received Mr. Lecht's letter of June 2, 1975 in which he advised her that she had been dishcarged because she had taken an unauthorized leave. Mr. Lecht had informed her that ACT had decided to terminate her employment because they could not "condone a staff member unilaterally deciding when and when not to take a leave" (Plf. Exh. 4; 297a).

Ms. Gatefield never responded to this letter except to write to ACT's controller in a letter which she testified was written on June 6, 1975 to tell him that:

> "Should my leave turn out to be permanent, I would like to continue my [medical] insurance privately if this is possible." (Def. Exh. A; 284a)

She didn't protest Mr. Lecht's letter. She offered no explanations. She made no rebuttals. She made no requests

for reinstatement. She made no requests for lost compensation. She did none of the things that would be expected of any person faced with that kind of a letter of termination, especially a professional with substantial educational background and scientific and technical experience.

Ms. Gatefield knew she had "left on her own accord against the will of her employer." (Judge MacMahon's charge, 228a/19-22) She testified:

> "At the time you wrote this letter, Miss Gatefield, you knew, did you not, that Mr. Lecht had asked you not to leave?
>
> A. Yes, he asked me not to leave on May 31....He asked me to stay for another week." (126a/25-127a/9)

In fact, her actions in response to Mr. Lecht's letter----instead of challenging or questioning that letter---- were to immediately look for a job in England (128a/7-10). This conduct totally belies any claim she could possibly make that she had permission to leave, or that she was not leaving "against the will of her employer."

Her behavior is identical----indeed, it represents a stronger case for the employer----than in White v. Ammann & Whitney, 22 A.D. 2d 674 (1st dept., 1964). There, the Appellate Division reversed not only a jury of laymen which

had found in favor of the employee, but a judge who had done so, and concluded that the plaintiff who never made an effort to refute the defendant's notice of termination for thirty days, was not "credible" in raising an after-the-bell legal challenge to that termination. In the case at bar, plaintiff never refuted the letter of termination, never challenged its assertion that she had gone on an unauthorized leave and, obviously knowing that she had been terminated for cause, sought other employment without any protest at all.

II.

Employer Had Legal Right to Revoke Any Modification It Made to the Written Contract, and That Revocation Was Made

The contract upon which Ms. Gatefield commenced this action made no provision whatsoever for leaves of absence. In fact, even vacations had to be taken only when "consistent with the performance of [Ms. Gatefield's] duties" under the contract (276a, paragraph 6). The agreement contained an integration clause which precluded any oral modifications (278a, paragraph 12), and a non-waiver clause (Id., paragraph 10).

While the Court of Appeals did not issue a decision, it did state during the argument on appeal that the jury's decision would be upheld because the jury could have concluded that the employer had granted its consent to Ms. Gatefield's request for a leave and had no right to revoke it, or had not revoked it. This argument was never raised by the appellee, but even if it had, the position is without support as a matter of law. Since the contract made no provision for leaves of absence, her request was for a gratuitous benefit. The granting of this benefit was without consideration. In fact, the modification was a nullity as a matter of law and unprovable and unenforceable, e.g., Columbia Broadcasting System v. Roskin Distributors, Inc., 31 A.D.2d 22 (1st dept., 1968) aff'd 28 N.Y. 2d 559 (1971).

Any oral modification to that contract was unenforceable as an executory contract, and any agreement by the employer to relax the terms could be repudiated at any time, especially where there was no change in position whatsoever by Ms. Gatefield, 2 Corbin on Contracts, §310.

To restrain an employer from changing its mind when circumstances dictated the retention of a senior manager on a project which she herself admitted was "important" to the Company (104a/11-12) is not compelled by any proivision of contract law, nor can it be supported by any notions of equity.

Such a rule (barring employers from withdrawing their grants of gratuitous leaves of absence) would cripple employers who found themselves requiring the continued services of these employees, especially when they are senior staff members and project managers such as Ms. Gatefield.

Can this Court truly believe that an employer who generously grants his employee a leave of absence----not called for by an agreement or term of employment----cannot retract that permission when the work load of the office makes that employee's services necessary during that period of time?

And isn't that flexibility more compelling when the employee in question is a person of highly developed technical skills who is acting as a manager of a vital project with a new and major client?

Such a theory----if applied here, and in other cases----will severely impair the employer's management and control of his staff. Moreover, it may very well act as a deterrent to future grants of leaves of absence by employers concerned with the irrevocability of these grants, which could cause prejudice to employees, as well as employers.

Conclusion

The Court below charged that the jury would have to find for the employer if it found that Ms. Gatefield did not have the employer's permission when she left her job to to on a leave of absence on or about June 1, 1975. At no time did Ms. Gatefield testify that she had that permission; on the contrary, she explicitly testified that she was asked by the President of ACT not to leave, and never rebutted the testimony of ACT's Executive Vice President who testified that he had explicitly advised her that she could not leave.

Her testimony concerning her actions subsequent to receiving the notice of termination from Mr. Lecht conclusively underscores the defendant's position that she knew she had been discharged for cause. She did nothing in response to that notice to challenge Mr. Lecht's position that he could not condone unilateral leaves of absence and did nothing to question or explain her version. Her only steps were consistent with only one conclusion and that was that she understood that this was a justifiable termination.

In viewing her testimony in the most favorable light. she must be deemed to have received ACT's initial consent to take a leave of absence. But that consent was withdrawn or

revoked, by both the Executive Vice President of ACT and its President, as she has admitted. In any event, as a matter of law, an employer has the right to revoke an oral modification to a written employment contract, particularly where the employer has gratuitously given an employee permission to take a leave clearly not covered by the agreement, and where the employee has not acted in reliance upon that modification. The right to do so is even more compelling where the revocation is dictated by the critical needs of the company for the employee's services on a project of crucial significance to the company.

For the reasons above stated, we urge this Court to grant defendant-appellant's petition for rehearing.

Respectfully submitted,

Lewis & DeClemente
Attorneys for Defendant-
Appellant

by: Paul Z. Lewis

State of New York)
County of New York) :

Joyce Dowden, being duly sworn, deposes and says, that on the 10th day of May, 1977 she served the within Petition for Rehearing on

Ralph Ferney, Esq.
299 Park Avenue
New York, N. Y.

attorney for plaintiff-appellee, by depositing a true copy (two copies) of same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States post office department. I am over the age of 18 years.

Joyce Dowden

Sworn to before me this
10th day of May, 1977

Paul Z. Lewis
Notary Public, State of New York
No. 31-4526714
Qualified in New York County
Comm. expires March 30, 1978